Supreme Court, U.S.
FILED
JAN 7 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1065

STATE OF TEXAS
Respondent

v.

MADALYN MURRAY O'HAIR
Petitioner

****

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

****

Paul D. Funderburk
Attorney for Petitioner
2210 Hancock Drive
Austin, Texas 78756
512-458-1244

January 4, 1980

IN THE
SUPREME COURT OF THE UNITED STATES

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STATE OF TEXAS
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MADALYN MURRAY O'HAIR
Petitioner

PETITION FOR A WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Madalyn Murray O'Hair, prays (excuse the expression) that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit entered November 9, 1979, affirming an order of the U.S. District Court for the Western District of Texas. The District Court had remanded a criminal misdemeanor case to a Texas state court. The criminal misdemeanor case had been removed from such state court to the U.S. District Court on Petition for Removal under *28 U.S.C. 1443(1).*

OPINIONS BELOW

The judgment of the U.S. Court of Appeals for the Fifth Circuit (not reported) was entered pursuant to Local Rule 21 on the summary docket of the U.S. Court of Appeals in Cause No. 79-1823. (See Appendix.) The Order Remanding entered by the U.S. District Court of the Western District of Texas, Austin Division, in Cause No. A-78-CA-259, is not reported. (See Appendix.)

JURISDICTION

Jurisdiction of this Court is timely invoked under *28 U.S.C. Sec. 2101 (c)* and *28 U.S.C. Sec. 1254(1)* and Rule 19-1(b) of the Rules of the Supreme Court of the United States. Judgment of Court of Appeals was entered November 9, 1979 and mandate stayed until January 10, 1980. (See Appendix.)

QUESTION PRESENTED

Is it an instance of unconstitutional reverse discrimination proscribed by the decision of this Court in *Regents of the University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750*, for a federal court to deny a right of removal under *28 U.S.C. Sec. 1443(1)* on the basis that the civil rights involved in the case (which concerns "free exercise of religion" and *42 U.S.C. 1983*) are not "stated in terms of racial equality?"

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and *28 U.S.C. Sec. 1443* and *42 U.S.C. Sec. 1983.*

STATEMENT OF THE CASE

The Petitioner, Madalyn Murray O'Hair, was arrested on November 3, 1977 at a meeting of the city council of Austin, Texas while protesting the unconstitutionality of an invocation prayer being performed at such meeting. She was charged with "disrupting a public meeting" under *Sec. 42.05, Texas Penal Code*, a criminal misdemeanor providing for punishment by fine not to exceed $1,000.00 and/or imprisonment not to exceed 180 days. The complaint and information were filed in County Court at Law No. 1, Travis County, Texas on November 15, 1977. On November 28, 1978, Petitioner removed the criminal proceedings to the United States District Court for the Western District of Texas, under *28 U.S.C. 1443(1)*, by a removal petition. The removal petition alleged, in essence, that the criminal prosecution was a violation of her rights under *42 U.S.C. Sec. 1983* in that it violated her rights as an Atheist under the establishment and free exercise clauses of the First Amendment to the United States Constitution. Additionally, the removal petition stated that Atheists (such as Petitioner) are systematically excluded from participation in any judicial proceeding in the State of Texas. The exclusion of Atheists from holding office or public trust is expressly provided by the Texas Constitution, Article 1, Section 4. The removal petition also stated that Texas state courts may not hear any challenge to Article 1, Section 4 of the Texas Constitution because of a prohibition contained in Article 1, Section 29 of the Texas Constitution, which obviates jurisdiction of Texas courts over matters involving all of the "Texas Bill of Rights" (Article 1 of the Texas Constitution). An order remanding the criminal misdemeanor case to the Texas state court was entered on March 13, 1979 by the judge of the U.S. District Court. Petitioner appealed from such order. The U.S. Court of Apeals for the Fifth Circuit by its order of November 9, 1979, affirmed the order of the U.S. District Court.

Petitioner now requests issuance of a Writ of Certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit in affirming the order of the District Court which remanded the criminal misdemeanor prosecution.

The order (as entered by the U.S. District Court on March 13, 1979) stated that the removal petition was defective in alleging a civil rights violation based only on religion and in failing to show a ground for removal "stated in terms of racial equality."

"This racially exclusive interpretation of the civil rights removal statute was based on *obiter dictum* contained in the cases of *Johnson v. Mississippi, 421 U.S. 213*, and *Georgia v. Rachel 384 U.S. 780*

An order staying issuance of the mandate until January 10, 1980, was entered by the U.S. Court of Appeals, Fifth Circuit. (See Appendix.)

REASONS FOR GRANTING THE WRIT

The reason for granting the writ in this case under Supreme Court Rule 19 is that the Court of Appeals has decided a question of federal law in a way in conflict with an applicable decision of this Court. The order remanding this case to the Texas court stated:

> It has consistently been held, however, that removal of a criminal action pursuant to the above section must satisfy a two-pronged test: (1) the right upon which the petitioner relies must be a right under a federal law providing for civil rights stated in terms of racial equality; and (2) it must appear that the petitioner is denied or cannot enforce the specified federal rights in the courts of the state. *Georgia v. Rachel, 384 U.S. 780 (1966); Johnson v. Mississippi, 421 U.S. 213 (1975).*
>
> It is plainly obvious that Petitioner cannot satisfy the first prong of the test in this case. There is no claim that Petitioner is being denied a right under any federal law providing for racial equality.

Subsequent to the cases of *Georgia v. Rachel, supra,* and *Johnson v. Mississippi, supra,* this court held that reverse discrimination against Caucasian persons is unconstitutional (*Regents of the University of California v. Bakke, supra*).

In instant case, it is discriminatory against Petitioner to require that a ground for removal be "stated in terms of racial equality" *in addition to* a showing that she is denied or cannot enforce, in the Texas court, her constitutional rights to a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution as well as *42 U.S.C. 1983.*

Such a judicial interpretation of civil libertarian rights statutes deprives all civil rights, by reason of procedural denials, to other persons covered by the Civil Rights Act, which is couched in terms of protection for ethnic groups, race, sex and religion, therefore emasculating those provisions in that Act, being a judicial narrowing of the rights intended to be protected by Congressional fiat.

Also, the violation of Petitioner's civil rights in this criminal misdemeanor proceeding in a Texas court is a violation of the "free exercise of religion" clause of the First Amendment to the U.S. Constitution. The prosecution is based on her protest of the unconstitutionality of an invocation prayer being performed at a city council meeting.

Petitioner can easily prove up the second prong of the two-prong test since the misdemeanor proceeding is filed in a state court from which all Atheists are banned from acting as judge or jurors and from any other state office of public trust under Article 1, Section 4 of the Texas Constitution. Petitioner cannot raise an objection to the unconstitutionality of the Texas Constitutional provision which excludes Atheists from any such service as judge, or jurors, or persons in office of public trust because Article 1, Section 29, Texas Constitution deprives all Texas courts jurisdiction

to consider such an objection. Petitioner is an avowed Atheist and public advocate of Atheism.

Under such circumstances, a further requirement that Petitioner state a ground for removal "in terms of racial equality" is discrimination against her and against all other victims of non-racial civil rights violations in state courts.

The removal statute relevant to this proceeding, *28 U.S.C. 1443(1)*, does not, by its express terms, exclude Petitioner from removing this case to federal court when she shows that she is denied or cannot enforce her federal civil and constitutional rights in the Texas court where this prosecution is filed. The only basis for preventing the removal is that she does not state a ground for removal "in terms of racial equality." Such limitation on the right of removal under *28 U.S.C. 1443(l)* is, of course, an application of the doctrine of *stare decises*.

However, such limitation on the right of removal must bend to the mandate of the U.S. Contstitution which prohibits reverse discrimination. A judicial theology of case law, however useful in most cases must be reconsidered when the U.S. Constitution is violated by its application. This is a case of first impression regarding the interpretation of the removal statute *28 U.S.C. 1443(1)* after the decision in the case of *Regents of the University of California v. Bakke, supra.*

CONCLUSION

A judicial interpretation of the removal statute, *28 U.S.C. 1443(1)* cannot deprive Petitioner of constitutional civil rights guaranteed when such interpretation constitutes an instance of reverse discrimination under the holding in *Regents of the University of California v. Bakke, supra.* A right of removal under federal statute restricted to civil rights protected by federal laws providing for racial equality affords advocates of racial equality a degree of protection

greater than that accorded to others who are discriminated against in state courts because of national origin, religion, ethnic group or sex. The Writ should be granted because the Court of Appeals has decided a federal question in a way which is in conflict with the holding in *Regents of the University of California v Bakke, supra.*

Paul D. Funderburk

PROOF OF SERVICE

I, Paul D. Funderburk, attorney for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 4th day of January, 1980, I served copies of the foregoing Petition for Writ of Certiorari on the state of Texas and the Solicitor General of the United States and United States Department of Justice by mailing a copy in a duly addressed envelope, with postage prepaid to:

Mr. James McMurtry
Travis County Attorney
Travis County Courthouse
Austin, Texas

U.S. Department of Justice
Civil Division
10th and Constitution Avenues
Washington, D.C. 20530

The Solicitor General
Department of Justice
Washington, D.C. 20025

The Hon. Edward Wadsworth
Clerk, U.S. Court of Appeals,
Fifth Circuit
600 Camp Street, Room 102
New Orleans, Louisiana 70130

Paul Funderburk

Paul D. Funderburk
Attorney for Petitioner
American Atheist Center
2210 Hancock Drive
Austin, Texas 78756
512-458-1244

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APPENDIX INDEX

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previouisly ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FOURTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF TEXAS

ARTICLE ONE
BILL OF RIGHTS

Sec. 4. RELIGIOUS TESTS. No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being.

Sec. 29. PROVISIONS OF BILL OF RIGHTS EXCEPTED FROM POWERS OF GOVERNMENT; TO FOREVER REMAIN INVIOLATE. To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.

28 U.S.C. 1443(1)
CIVIL RIGHTS CASES

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the

defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

42 U.S.C. 1983
CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS

I, Joel B. Bennett, Assistant County Attorney of Travis County, in said State on the written affidavit of D. Whitehead, a competent and credible person herewith filed in the County Court at Law No. 1, Travis County, Texas, do present in and to said Court: That in the County of Travis, State of Texas, on or about the 3rd day of November, A.D. 1977, and anterior to the filing of this information, one Madalyn E. O'Hair did then and there with intent to disrupt a lawful meeting of the Austin City Council, interfere with said meeting by talking loudly while the invocation was being attempted,

AGAINST THE PEACE AND DIGNITY OF THE STATE.

(Signed) Joel B. Bennett
Assistant County Attorney,
Travis County, Texas.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

STATE OF TEXAS

v.

MADALYN MURRAY O'HAIR

IN THE COUNTY COURT
AT LAW NO. ONE

TRAVIS COUNTY, TEXAS,
CAUSE NO. 168,020

PETITION FOR REMOVAL

TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS:

Petitioner shows to this Court:

1. Petitioner is the Defendant in the above-entitled prosecution.

2. The Prosecution is under Article 42.05, Texas Penal Code, distrupting a public meeting and was commenced in, and is now pending in, the County Court at Law No. 1 of Travis County, Texas, a court of the State of Texas and has not yet been brought to trial. The prosecution was commenced by filing of an information in said Court charging that Petitioner "...did then and there with intent to disrupt a lawful meeting of the City Council interfere with said meeting by talking loudly while the invocation was being attempted." The "invocation" therein referred to was a prayer held at said meeting of the Austin City Council.

3. The Petitioner is Plaintiff in Civil Action No. A-77-CA-236 filed on December 13, 1977 and now pending in this Court wherein Petitioner alleges that the prayers of the Austin City Council are unconstitutional and are an establishment of religion proscribed by Amendment I to the United States Constitution and Amendment XIV. Additionally, Petitioner is Plaintiff in Civil Action A-78-CA-220 now pending in this Court wherein Petitioner alleges that the Constitution of the

State of Texas deprives her of equal protection of the law under the United States Constitution in that she is a person who does not acknowledge the existence of a Supreme Being whereas Article I, Section 4 of the Texas Constitution requires such belief of all persons holding a public office in Texas, including judges and jurors. it is further alleged in Civil Action A-78-CA-220 that Texas Courts are without jurisdiction to entertain any objection to Article I, Section 4 of the Texas Constitution because the same is a part of the Texas Bill of Rights which cannot be changed or declared unconstitutional in any state court under Article I, Section 29 of the Texas Constitution.

4. Petitioner is denied, and cannot enforce in the judicial tribunals of the state, a right secured to Petitioner by the law of the United States for the equal civil rights of citizens of the United States to wit: The right to a trial conducted under Amendments VI, I, and XIV, of the United States Constitution and under Article VI of the United States Constitution as well as the right to a republican form of government in the State of Texas under Article IV, Section 4 of the United States Constitution, and the right to city council meetings in Austin Texas in which prayer is not a part under the establishment clause of the First Amendment to the United States Constitution.

WHEREFORE, Petitioner prays that the information and its prosecution be removed into the United States District Court for the Western District of Texas, for trial pursuant to section 1443 of Title 28 of the United States Code.

Dated November 29, 1978.

(Signed) Paul Funderburk
Attorney for Petitioner
2210 Hancock Drive
Austin, Texas 78756
458-1244

STATE OF TEXAS
COUNTY OF TRAVIS

Paul Funderburk, of lawful age, being affirmed on his oath, says that he is attorney for petitioner herein; that he has prepared and read the foregoing petition for removal, and the matters and things contained therein are true, as he verily believes.

(Signed) Paul Funderburk

Subscribed and sworn to before me this 29th day of November, 1978.

My commission expires:(Signed) Ralph B. Shirley
Notary Public in and
for Travis County, Texas

June 9, 1979

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

STATE OF TEXAS
v. CIVIL ACTION NO. A-78-CA-259
MADALYN MURRAY O'HAIR

ORDER

Came on this day for consideration by the Court the motion by the State of Texas to remand the criminal proceedings in Cause No. 168,020, to the County Court-at-Law Number One of Travis County, Texas, from which those proceedings were removed to this Court by petition for removal filed November 29, 1978. After careful consideration of the pleadings, motion and brief in support thereof, the Court is of the opinion that this action was improperly removed and that the motion to remand therefore should be granted and the case remanded to state court.

Petitioner is a criminal defendant in the above-mentioned state court proceedings, charged with the violation of Article 42.05 of the Texas Penal Code, which makes it a misdemeanor offense for a person to obstruct or interfere with a lawful meeting or procession by physical action or verbal utterance. More specifically, Petitioner is alleged to have interfered with a meeting of the Austin City Council by talking loudly while the invocation was being given at the meeting on November 3, 1977.

Petitioner has sought removal of the criminal proceedings against her under 28 U.S.C. 1443, contending that the prosecution under 42.05 is unconstitutional because the invocation, or prayer, at the Austin City Council meeting amounts to an establishment of religion in violation of the First Amendment to the United States Constitution, and that she is being denied equal protection of the law in that she does not acknowledge the existence of a supreme being,

whereas Article I, Section 4 of the Texas Constitution requires such belief of all persons holding public office in Texas, including judges and jurors. Petitioner thus seeks to invoke the right to a trial conducted under Amendments VI, I, and XIV of the United States Constitution, the equal right to which she claims has been denied her, and which right she contends cannot be secured in the courts of the State of Texas.

28 U.S.C. 1443 provides for the removability of any civil action or criminal prosecution

> "[a]gainst any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof."

It has consistently been held, however, that removal of a criminal action pursuant to the above section must satisfy a two-pronged test: (1) the right upon which the petitioner relies must be a right under a federal law providing for civil rights stated in terms of racial equality; and (2) it must appear that the petitioner is denied or cannot enforce the specified federal rights in the courts of the state. *Georgia v. Rachel, 384 U.S. 780 (1966); Johnson v. Mississippi, 421 U.S. 213 (1975).*

It is plainly obvious that Petitioner cannot satisfy the first prong of the test in this case. There is no claim that Petitioner is being denied a right under any federal law providing for racial equality.

> "Claims that prosecution and conviction will violate her rights under constitutional or statutory provisions of general applicability or under statutes not protecting against racial discrimination, will not suffice. That a removal petitioner will be denied due process of law because the criminal law under which he is being prosecuted is allegedly vague or that prosecution is assertedly a sham, corrupt, or without

> evidentiary basis does not, standing alone, satisfy the requirements of 1443(1)." *Johnson v. Mississippi, 421 U.S. at 219, supra.*

It is thus clear that any federal defense which Petitioner wishes to claim in the context of the criminal proceedings against her will have to be raised and presented in the state court, and cannot form the basis for removing the action to this Court. Accordingly, it is

ORDERED, ADJUDGED, and DECREED that the Motion to Remand be, and hereby is, GRANTED, and that this action be, and hereby is, REMANDED to the County Court-at-Law Number One of Travis County, Texas.

Entered this 13 day of March, 1979, at Austin, Texas.

(Signed)

Jack Roberts, United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-1823
Summary Calendar*

DO NOT PUBLISH

STATE OF TEXAS,
Plaintiff-Appellee

versus

MADALYN MURRAY O'HAIR,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

(NOVEMBER 9, 1979)

Before GODBOLD, RONEY, and VANCE, Circuit Judges.

PER CURIAM:

The motion of appellants to supplement the record is DENIED.

AFFIRMED. See Local Rule 21.[1]

Costs are taxed against the defendant-appellant.

*Fed. R. App. P. 34(a); 5th Cir. R. 18.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

ISSUED AS MANDATE:

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK
Gilbert F. Ganucheau tel 504-589-6514
Clerk 600 Camp Street
New Orleans, La. 70130

December 11, 1979

Mr. Paul D. Funderburk
Attorney at Law
2210 Hancock Dr.
Austin, TX 78756

NO. 7901823 — STATE OF TEXAS vs. MADALYN MURRAY O'HAIR

MANDATE STAYED TO AND INCLUDING JANUARY 10, 1980

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate will issue immediately under Rule 41, FRAP.

Under revised rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for a writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, if any, judgment, or Rule 21 decision, and the denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours

GILBERT F. GANUCHEAU, CLERK
(Signed) Brenda Hauck, Deputy Clerk

/bh

enc.
cc: (LETTER ONLY)
Mr. James McMurtry

Supreme Court, U. S.
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OCTOBER TERM, 1979

NO. 79-1065

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Petitioner

VS.

STATE OF TEXAS

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

James L. McMurtry
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Travis County, Texas
P. O. Box 1748
Austin, Texas 78767
512/478-3415

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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PETITIONER

VS.

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VS.

STATE OF TEXAS

RESPONDENT

BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent, State of Texas, herewith respectfully prays that the Petition for Writ of Certiorari filed by Petitioner be denied for the reason that the decision of the United States Court of Appeals for the Fifth Circuit was consistent with the applicable decisions of the United States Supreme Court and all other federal courts which have examined the question of the appropriate-

ness of the removal of state criminal prosecutions pursuant to 28 U.S.C. § 1443(1), and in support of which, the State of Texas would show the Honorable Court the following:

Petitioner O'Hair, the defendant in the state criminal prosecution sought to be removed to the United States District Court for the Western District of Texas, Austin Division, is not entitled to have the criminal proceedings filed against her removed from state court. The consistent holdings pertaining to the removal statute, 28 U.S.C. § 1443(1), require that removal of a criminal action may be granted only upon satisfaction of a two-pronged test: (1) the right upon which the petitioner relies must be a right under a federal law providing for civil rights stated in terms of racial equality; and (2) it must appear that the petitioner is denied or cannot enforce the specified federal rights in the courts of the state. *Georgia v. Rachel*, 384 U.S. 780 (1966); *Johnson v. Mississippi*, 421 U.S. 213 (1975).

In *Rachel*, the Supreme Court analyzed 28 U.S.C. § 1443(1) and determined that a person seeking removal of a state prosecution must satisfy both requirements of the subsection. A petitioner "must show both that the right upon which [he relies] is a 'right under any law providing for...equal civil rights' *and* that [he is] 'denied or cannot enforce' that right in the [state court]." *Georgia v. Rachel, supra*, 384 U.S. at 788 (emphasis supplied). The Supreme Court concluded that "the phrase 'any law providing for...equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality." *Id.*, 384 U.S. at 792. In *Johnson v. Mississippi*, the Court again recognized and applied the two-pronged test as stated in *Georgia v. Rachel*. *Johnson v. Mississippi, supra*, 421 U.S. ar 219f.

Petitioner O'Hair cannot satisfy the first prong of the test for removal of the Texas criminal proceeding. She has made no allegation in her Petition for Removal that she is being denied a right under any federal law providing for racial equality. In *Johnson*, the Court stated that broad allegations of violations of constitutional rights of general applicability are insufficient to justify removal under 28 U.S.C. § 1443(1). *Id.* at 219. Failing to recognize the necessity for specific allegation of a right under any federal law providing for equal civil rights, Petitioner O'Hair has attempted to rely strictly on broad allegations that she is denied and cannot enforce in the state court rights secured to her by Amendments I, VI, and XIV of the United States Constitution and the right to a republican form of government in the State of Texas, as secured by Article IV, Section 4 of the United States Constitution. See, Petition for Removal, Paragraph 4.

Although the decision of the United States District Court did not require the Court to discuss the second prong of the *Rachel-Johnson* test, it is clear that Petitioner O'Hair cannot satisfy the second prong of the test. The broad allegations made by O'Hair to support removal can

prove no more successful than the allegations contained in the petitions for removal dealt with in *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), the companion case to *Georgia v. Rachel, supra*. In *Peacock*, the persons seeking removal alleged that they were charged with various offenses under state law because they were Negroes or they were attempting to help Negroes assert their rights under federal equal civil rights laws. Yet, none of the petitioners in *Peacock* relied upon specific provisions of a pre-emptive federal civil rights law. The Supreme Court distinguished the *Peacock* case from *Rachel* in "two significant respects":

> First, no federal law confers an absolute right on private citizens- on civil rights advocates, on Negroes, or on anybody else-to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a policeman. Second, no federal law confers immunity from state prosecution on such charges.

City of Greenwood v. Peacock, 384 U.S. at 826-827. Accordingly, the Court refused to permit removal of such criminal prosecutions for failure to satisfy the second prong of the test enunciated in *Rachel*. Petitioner O'Hair also falls short in meeting the requirement of the second prong of the *Rachel* test. In her Petition for Removal, O'Hair alleges no specific federal right which confers on her the right to disrupt a lawful meeting, nor does she allege a federal law conferring immunity from state prosecution on such charge. Consequently, removal is not appropriate in this case.

Petitioner O'Hair's reliance on *Regents of the University of California v. Bakke*, 429 U.S. 953 (1978), is inappropriate. Assuming *arguendo* that *Bakke* destroys the viability of the first prong of the *Rachel-Johnson* test as it pertains to a right stated in terms of racial equality, the test is stated in the conjunctive. Persons desiring to remove state criminal proceedings would continue to be required to satisfy the second requirement. In the instant case, Petitioner must allege facts sufficient to make it appear that she will be denied or cannot enforce specified federal rights in the Texas courts. As has been stated above, O'Hair has wholly failed to meet the requirements of the second prong.

Petitioner O'Hair attempts to rely upon Article I, Section 4 of the Texas Constitution as being a pervasive state law which on its face shows that she will be denied or that she cannot enforce her federal rights in the state courts in Texas. There is not the ability to clearly predict that O'Hair's federal rights will be denied by the criminal prosecution in the state court. The policy behind the removal statute is not to bring every state prosecution which could conceivably involve a federal constitutional question into the federal courts for adjudication. In fact, as

the Supreme Court reaffirmed in *Johnson v. Mississippi, supra,* 412 U.S. at 220, and stated originally in *City of Greenwood v. Peacock:*

> The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethern of the state judiciary on trial. Under § 1443(1), the vindication of the defendant's federal rights is left to the state courts except in rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court.

City of Greenwood v. Peacock, supra, 384 U.S. at 828.

It is therefore, evident that removal of the Texas prosecution is not available to Petitioner O'Hair in this case. Accordingly, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, James L. McMurtry, attorney for the State of Texas, hereby certify that on February 1, 1980, I served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on Madalyn Murray O'Hair by mailing the requisite copies in a duly addressed envelope, with postage prepaid to:

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